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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

CARL FRANKLIN ELLISON,

Defendant and Appellant.

E056159

(Super.Ct.No. RIF147217)

OPINION

APPEAL from the Superior Court of Riverside County. Harold F. Bradford, Judge. (Retired judge of the Alpine Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed as modified with directions.

Richard Schwartzberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Jim Dutton and Meredith S. White, Deputy Attorneys General, for Plaintiff and Respondent.

This is defendant Carl Franklin Ellison's second appeal in this case. We previously affirmed defendant's convictions but remanded the matter for resentencing. Defendant now appeals from that resentencing, claiming (1) the trial court erred in not

awarding him actual custody credits from the date of his arrest to the date of resentencing, and (2) the trial court erred by assessing a court security fee pursuant to Penal Code section 1465.8, subdivision (a)(1) of \$40 per conviction rather than the \$30 required at the time of his conviction. We will find that the court ordered the proper number of custody credits, although there was some confusion as to the exact nature of the credits. We will further find that the court erred in imposing a \$40 fee per conviction. We will modify the judgment and order the abstract amended accordingly.

I

PROCEDURAL BACKGROUND¹

Defendant was convicted of two robberies (Pen. Code, § 211; counts 1 & 3) and felony evading of a peace officer (Veh. Code, § 2800.2; count 2). The jury also found true the special allegation that a principal was armed with a firearm during the commission of the robberies in counts 1 and 3. (Pen. Code, § 12022, subd. (a)(1).) In a bifurcated proceeding, defendant admitted he had suffered three prior serious or violent felony convictions. (Pen. Code, §§ 667, subds (c), (e)(2)(A)) & 1170.12, subd. (c)(2).) (*People v. Ellison* (Aug. 18, 2011, E050585) [nonpub. opn.])

Pursuant to *People v. Superior Court (Romero)* 13 Cal.4th 497, the trial court struck all three of defendant's prior convictions before sentencing. Defendant was given a total sentence of six years in state prison.

¹ The facts of the underlying conviction are not relevant to the issues raised on appeal.

In the prior appeal, we agreed with defendant that he had been improperly sentenced to a full-term consecutive sentence on the evading a police officer conviction. We also agreed with the People that “it was an abuse of the trial court’s discretion in this case to find that defendant was outside the sentencing scheme of the three strikes law.” We remanded the case for resentencing in accordance with the opinion.

Upon remand, the trial court conducted a *Romero* hearing.² At the conclusion of the hearing, the trial court struck two of defendant’s three prior strikes. Defendant was sentenced to 10 year 8 months.

II

ACTUAL CUSTODY CREDITS

Defendant contends in this appeal that the trial court abused its discretion by failing to award him the proper actual custody credits accumulated until resentencing as directed by *People v. Buckhalter* (2001) 26 Cal.4th 20. The People agree that the abstract of judgment does not properly reflect the actual custody credits.

A probation report filed on February 24, 2012, the date of resentencing, calculated that defendant had 440 days of local time, 66 days of conduct credits pursuant to Penal Code section 2933.1, and 700 days of state prison time. It calculated the total time to be 1,200 days. At resentencing, the trial court stated that defendant was entitled to “local time credit of 440 days actual, 66 day conduct for local time of credits, totaling 506 days.” It then stated, “He has also -- and I don’t think the Court has to make this order

² Defendant does not raise any issues on appeal that pertain to the *Romero* hearing. As such, we need not address the facts adduced at the hearing.

today, but the Court will note for the record in case it is needed for the Abstract to go forward to the corrections department that he is entitled to 700 days State prison credit in addition. [¶] The reason why I'm not sure I have to make that finding is that those findings or those determinations are made by the Director of Corrections as he serves his sentence. But we will note it for the record so that it's clear that as he goes back into prison as of this date, he's entitled to 1,200 days' credit for time served. I think there's an error in the computation there. Should be . . . 1,206 shouldn't it?" The People agreed. The trial court responded, "[T]he critical one is only the 440 plus 66 local."

The minute order for the date of sentencing states that he was given 440 days of actual time plus 66 days pursuant to Penal Code section 2933.1, for a total of 506 days. Further, he was entitled to 700 days of state prison credit. The total amount would be 1,206 days. On the abstract of judgment, his credits are reflected as 440 actual days plus 66 days of conduct credit for a total of 506 days in section 14, which pertains to custody credits. Another notation on the abstract of judgment, in section 11 called "Other Orders," states as follows: "Court recognizes defendant has 700 days STATE PRISON CREDIT TIME SERVED." As of today, defendant is entitled to 1206 DAYS CREDIT TIME SERVED."

A defendant "sentenced to prison for criminal conduct is entitled to credit against his [or her] term for all actual days of [presentence] confinement solely attributable to the same conduct. [Citations.]" (*People v. Buckhalter, supra*, 26 Cal.4th at p. 30.) As such, trial courts must add additional actual credits upon a remand for resentencing attributable to the time spent in state prison prior to resentencing but should not award additional

conduct credits under the presentence formula. (*Id.* at pp. 37, 41.) Here, the trial court properly determined that defendant should receive 440 days of actual credit prior to the original sentencing, 700 days for time spent in prison, and 66 days of conduct credit, although it was not certain whether the 700 days should be included in the actual time served. The local time and prison time should have been combined for a total of 1,140 actual days of presentence confinement. (*Ibid.*)

We will order that the abstract of judgment be modified to reflect 1,140 actual custody credits, plus 66 days of conduct credit, for a total of 1,206 days. Any reference to prison time in section 11 of the abstract of judgment shall be deleted.

III

COURT SECURITY FEE

At the resentencing, the trial court imposed \$40 per count for the court security fee pursuant to Penal Code section 1465.8, subdivision (a)(1). Defendant contends that at the time of his conviction, the court security fee was \$30 per count. He contends that the court security fee must be modified. The People agree.

Defendant was convicted on February 19, 2010. At that time, Penal Code section 1465.8, subdivision (a)(1) required a \$30 fee to be imposed on every conviction. On October 19, 2010, section 1465.8 was amended to raise the fee to \$40. (Stats. 2010, ch. 720, § 33.) However, “a person stands ‘convicted’ upon the return of a guilty verdict by the jury or by the entry of a plea admitting guilt. [Citations.]” (*People v. Davis* (2010) 185 Cal.App.4th 998, 1001.) Thus, for purposes of the court security fee, defendant

stood convicted on February 19, 2010. At that time, the fee was \$30. Accordingly, the court erred in imposing a \$40 fee. We modify the judgment to reduce the fee to \$30.

IV

DISPOSITION

The superior court clerk shall prepare an amended abstract of judgment reflecting that defendant is entitled to 1,140 days of actual custody credits, 66 days of conduct credit pursuant to Penal Code section 2933.1, for a total of 1,206 days. In addition, the minute order from sentencing on February 24, 2012, and the abstract of judgment shall be modified to reflect a \$30 per conviction fee pursuant to Penal Code section 1465.8, subdivision (a) for a total of \$90. The corrected abstract of judgment should be forwarded to the California Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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RICHLI

Acting P. J.

We concur:

KING

J.

MILLER

J.